causes although its budget is insufficient to fund the requests. If carried to its logical conclusion, RLEA's Tucker Act argument would permit Congress to shift the burden of any public project to named persons by deferring to a much later date the resolution of whether the Government's action was constitutional. The Tucker Act obviously was not intended for such a purpose—nor has it been used for such a purpose up to now.

In the cases in which the availability of a Tucker Act remedy has been held to satisfy constitutional standards, one of two elements was present: (1) the public interest required the immediate application of particular non-fungible property to a particular purpose; (2) there was no showing that any property interest definitely would be taken. Thus, in the *3R Act Cases*, *supra*, 419 U.S. at 156, specific rail property was required to permit the creation of Conrail and to prevent chaos in rail transportation in the Northeast; there was no certainty that the assets of the former private railroads conveyed to Conrail, measured against the one and one-half billion dollars held in escrow, would leave a constitutional shortfall for which additional compensation might be due, but the Court found that if a shortfall occurred, it would constitute a taking for which just compensation was required. In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 86 (1978), there was no showing that there would be a taking unless an unprecedented nuclear disaster occurred; in *Dames & Moore v. Regan*, 101 S.Ct. 2972 (1981), there was no showing that there would be an uncompensated taking because the claims of the Americans may well be fully satisfied by the Special Claims Tribunal; in *Hurley v. Kincaid*, 285 U.S. 95 (1932), specific land had to be utilized to prevent flooding in the area, and there was no showing that the land in question would be flooded more often after the new levees were built than it was before. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, *supra*, 101 S.Ct. 2352, 2369-70 (1981) and *Hodel v. Indiana*, 101 S.Ct. 2376, 2388 (1981), in which this Court found that no showing

had been made that the statute under review would impair, or to what extent it might impair, the beneficial use of any particular coal mining land.[30]

In this case, neither element is present. This case is different from those cases in which the Tucker Act remedy has been treated as a sufficient remedy not only because this case involves a taking which is unconstitutional in several respects even if it is later fully compensated, but also because the Government is seeking to take money, not specific property or any rights connected with the specific property needed for a particular public purpose. Unlike the situation in *3R Act Cases*, where the Government had an urgent need for specific rail properties to maintain rail service in the Northeast, here the Government cannot claim a specific need for funds from a bankrupt estate. The Rock Island estate's money is no different from any other. Moreover, it is certain that the Act will cause a taking of the Rock Island's money. Thus, that Congress did not specifically preclude a later Tucker Act remedy is insufficient to cure the constitutional defects which the reorganization court found in the statute. At a minimum, Judge McGarr did not abuse his discretion in finding it likely that the Act remained unconstitutional and that the estate would be irreparably harmed by its implementation.

B. In The Alternative, Whether Or Not The Availability Of A Tucker Act Remedy Cures The Constitutional Defects Of The Rock Island Act, This Court Should Determine The Taking Issue Now.

If this Court were to hold that even if there were a taking the Tucker Act remedy would provide "just compensation", and thus

[30]The other case upon which RLEA relies, *Coffman v. Breeze Corporations*, 323 U.S. 316 (1945), is also inapposite. In *Coffman*, the effect of the challenged Royalty Adjustment Act was merely to delay the payment of patent royalties. This Court held that plaintiff was requesting "an advisory opinion" as to the statute's constitutional validity at least in part because another suit was pending in which the plaintiff's entitlement to the royalties would be determined. 323 U.S. at 321, 324.

satisfy that constitutional requirement, the Court should nevertheless proceed to decide the taking issue now. Decision of that issue should not be deferred to a subsequent Tucker Act proceeding. The Government agrees and states cogent reasons why the taking issue should be decided at this time. Govt. Br. 17-20.

This Court was confronted with a parallel question in the *3R Act Cases, supra*, 419 U.S. at 149-50 n.36. The question there was whether to defer to a later Tucker Act hearing the issue of whether consideration for the possible taking was required to be in cash. The Court said,

> To delay until any Court of Claims adjudication with respect to the *form* of consideration provided by the Act would be exceedingly irresponsible: while the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy, it does suggest that Congress might wish to consider whether to abandon the whole Act if it turned out that the *entire* value of the rail properties must be paid in cash.

Id. (emphasis original). Precisely the same considerations are present in the case at bar. As the Government points out, Govt. Br. 19, Congress may wish to consider whether to "rescind the regulation or pay just compensation." Indeed, Congress has preserved this option for itself by the expedited review procedures of Sections 106(d) and 124 of the Rock Island Act, which insured that the Seventh Circuit would rule on the constitutionality of the Act within 60 days. These special procedures, as the Government suggests, enable Congress to reconsider the matter if it turns out that it has to foot the bill.

There can be no doubt that the question of whether the Rock Island Act effects a taking is justiciable and ripe for review by this Court inasmuch as the event that constitutes the taking and its impact on the Rock Island estate are certain, not hypothetical or speculative. *Cf. 3R Act Cases, supra*, 419 U.S. at 143; *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*, 343 U.S. at 548-85.

This distinguishes other cases relied upon by RLEA in which the Court has declined to decide a taking issue because of the existence of a remedy in the Court of Claims. See Govt. Br. 18. Moreover, appellees have included, as part of the prayer in their complaint, a request for a declaratory judgment under 28 U.S.C. § 2201 as to the constitutionality of the Act. See J.A. 21a-41a.

For the foregoing reasons, appellees agree with the Government that the taking issue should be decided now and should not be deferred to a subsequent proceeding under the Tucker Act.

CONCLUSION

This Court should dismiss the appeal in No. 80-415, for the reasons stated *supra* at 2–3. As to the appeal in No. 80-1239, this Court should affirm Judge McGarr's order of October 15, 1980, continuing in effect his preliminary injunction of June 9, 1980, on the ground that Judge McGarr was correct as a matter of law in finding the Rock Island Act unconstitutional or, in the alternative, on the ground that he did not abuse his discretion in finding a likelihood that the Act is unconstitutional and that the estate would be irreparably harmed if the Act were immediately implemented.

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September 26, 1981

APPENDIX A

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

The appellees in this case are William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company, The First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, in their capacities as Indenture Trustees, and Henry Crown et al., substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island. Parent companies, subsidiaries and affiliates of the appellees are as follows:

A. William M. Gibbons, in his capacity as Trustee of the Chicago, Rock Island and Pacific Railroad Company

Affiliates

A&M Ry. Bridge & Terminal Co.
The Belt Ry. Co. of Chicago
Calumet Western Ry. Co.
Denver Union Terminal Ry. Co.
Galveston Terminal Ry. Co.
Great Southwest R. R., Inc.
Houston Belt & Terminal Ry. Co.
Illinois Terminal R. R. Co.
Iowa Transfer Ry. Co.
Joliet Union Depot Co.
Keokuk Union Depot Co.
The Minnesota Transfer Ry. Co.
Oklahoma City Jct. Ry. Co.
Peoria & Bureau Valley R. R. Co.
Peoria Ry. Terminal Co.
Peoria Terminal Company
Pullman Railroad Company

Rock Island Improvement Co.
St. Paul Union Depot Co.
Trailer Train Company
Warren & Ouachita Valley Ry. Co.
Wichita Union Terminal Ry. Co.

B. The First National Bank of Chicago

Parent

First Chicago Corporation

Principal Subsidiaries

Network EFT, Inc.
International Commercial Bank Limited
N. V. Slavenburg's Bank

Principal Affiliates

First Chicago Cheque Corporation
First Chicago Trust Company of Arizona
First Chicago Realty Services Corporation
First Capital Corporation of Chicago
First Chicago Fiduciary and Investment Services Corporation
First Chicago Overseas Finance N. V.
First Chicago Financial Corporation
First Chicago Credit Corporation
Real Estate Research Corporation
First Chicago Lease Holdings, Inc.
UBAF Arab American Bank

C. Continental Illinois National Bank and Trust Company of Chicago

Parent

Continental Illinois Corporation

Subsidiaries

Continental International Finance Corporation
Continental Bank International (Texas)
Continental Bank International (Pacific)
Continental Bank International
Conill Bank A.G.
Continental Bank S.A./N.V.
Continental Illinois Bank (Switzerland)
Continental Development Bank, S.A.L.
Underwriters Bank (Overseas) Limited
Continental Illinois Thailand Ltd.

Affiliates

Continental Illinois Leasing Corporation
Continental Illinois Equity Corporation
Continental Illinois Venture Corporation
Republic Realty Mortgage Corporation
Continental Illinois (Canada) Ltd.
Continental Illinois Investment Advisory
Continental Illinois Limited
Continental Illinois International Investment

D. Henry Crown, et al., include the Arie and Ida Crown Memorial, an Illinois not-for-profit corporation, which has no parent, subsidiaries or affiliates.

Office - Supreme Court, U.S.
FILED
NOV 16 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 80-415 and 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and ANDREW L. LEWIS, JR., Secretary of Transportation,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENT TO BRIEF FOR THE ROCK ISLAND APPELLEES

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November 16, 1981

Nos. 80-415 and 80-1239

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Appellant,

v.

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; HENRY CROWN, et al.; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and ANDREW L. LEWIS, JR., Secretary of Transportation,
Appellees.

Consolidated Appeals From The United States District Court For The Northern District Of Illinois And From The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENT TO BRIEF FOR THE ROCK ISLAND APPELLEES

This supplement to the Brief For the Rock Island Appellees,[1] filed September 26, 1981, is submitted to advise this Court of the decision of the United States Court of Appeals for the Seventh Circuit, dated October 13, 1981, affirming the June 2, 1980 order of District Judge Frank J. McGarr (J. A. 269a-271a), by which he confirmed the total abandonment of all Rock Island lines and service and declined to permit the imposition of any labor protec-

[1]The Rock Island Appellees are: William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Continental Illinois National Bank and Trust Company of Chicago and The First National Bank of Chicago, as Indenture Trustees for the income debenture holders and first mortgage bondholders respectively, and Henry Crown, *et al.*, substantial holders of first mortgage bonds, income debentures and common stock of the Rock Island.

tion conditions or claims in connection with the Rock Island's abandonment. *In re Chicago, Rock Island & Pacific Railroad Company*, Nos. 80-1788, 80-2199 and 80-2286 (7th Cir. October 13, 1981) (unpublished order), *petition for rehearing filed November 10, 1981*, reprinted as Appendix A hereto.

Judge McGarr's June 2, 1980 order is cited throughout the brief submitted by the Rock Island Appellees as the law of this case with respect to any existing labor protection obligations of the Rock Island estate. The court of appeals' opinion and its affirmance of Judge McGarr's abandonment order establish that: (1) the Rock Island was entitled to abandon all of its rail operations (Slip op. at 4, 12; Appellees' Brief 24-28), and (2) the Rock Island had no labor protection obligations in connection with its total line abandonment (Slip op. at 10; Appellees' Brief 28-34). The court of appeals' conclusion that the Rock Island had no labor protection obligation supports the arguments advanced by the Rock Island Appellees that (1) the Rock Island Act[2] does not discharge any existing obligation of the estate, and therefore confers no benefit on the estate (Appellees' Brief 39-41), (2) the labor protection provisions of the Rock Island Act constitute a taking of the estate's private property for public purposes (Appellees' Brief 34-44), and (3) the Rock Island Act's labor protection provisions are impermissible retroactive impositions on the Rock Island estate (Appellees' Brief 55-60).

The court of appeals' affirmance of Judge McGarr's abandonment order thus provides support for Judge McGarr's finding that the Rock Island Act's labor protection scheme is unconstitutional as a matter of law, and for the position of the Rock Island

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[2]Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. §§ 1001-1018, as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, Title VII, Section 701, 94 Stat. 1895, 1959.

Appellees that Judge McGarr did not abuse his discretion in enjoining the Act's implementation.

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November 16, 1981

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued: June 10, 1980)
October 13, 1981

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM J. EAST, Senior District Judge*

Nos. 80-1788, 80-2199 and 80-2286

IN THE MATTER OF:

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,

Debtor.

APPEALS OF:

RAILWAY LABOR EXECUTIVE ASSOCIATION (RLEA),

Intervenor.

Appeals from the United States District Court for Northern District of Illinois, Eastern Division.

Nos. 75-B-2697
Frank J. McGarr, *Judge*

Order

Proceedings to reorganize the Chicago, Rock Island and Pacific Railroad Company ("Rock Island") under Section 77 of the Bankruptcy Act of 1938, as amended, 11 U.S.C. § 205 (1976), have been pending before the reorganization court since March 12, 1975. From the date the petition for reorganization was granted, through September 26, 1979, the Rock Island was operated under the direction of William Gibbons (the "Trustee") while attempts were made to devise an income-based reorganiza-

*The Honorable William J. East, Senior District Judge of the District of Oregon, is sitting by designation.

tion. On September 26, 1979, the Rock Island was declared cashless by the Interstate Commerce Commission ("I.C.C."), and it ceased operation as a railroad carrier. On January 25, 1980, after reviewing a Plan of Reorganization submitted by the Trustee, an independent consultant's analysis of the Plan and other submissions, the reorganization court [2] concluded that the core operation proposed by the Trustee was not feasible and ordered the Trustee to file a plan which would provide for the total liquidation of the estate.

On April 14, 1980, the reorganization court entered an order directing the Trustee to file an application with the I.C.C. "for its report confirming the abandonment of the Rock Island's total railroad system subject to sale of portions of such system to other operating entities for their operation thereof." In a report filed on May 23, 1980, in response to the Trustee's application for abandonment, the I.C.C. concluded that "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity."

On June 2, 1980, the reorganization court held a hearing concerning the proposed abandonment, and ordered systemwide abandonment of the Rock Island's lines and discontinuance of its service.

The RLEA had earlier appealed from the district court's orders authorizing liquidation of the Rock Island. In an unpublished order dated February 11, 1981, this court affirmed the order of the district court, holding that "the reorganization court had the jurisdiction under § 77 to decline to accept the Trustee's Plan and to order the Trustee to formulate a plan of liquidation. Furthermore, the reorganization court properly exercised its jurisdiction."

The present appeal challenges the systemwide abandonment order of June 2, 1980, and, in particular, its treatment of the labor

protection issues. We affirm.[1]

I.

Appellants maintain that the reorganization court's June 2, 1980, order authorizing systemwide abandonment should be reversed because the court failed to (1) conduct an adequate evidentiary hearing, (2) consider the public interest, and (3) provide labor protection.

[3] **A. Evidentiary Hearing**

Section 17 of the 1979 Milwaukee Railroad Restructuring Act ("MRRA") empowers reorganization courts proceeding under § 77 of the Bankruptcy Act of 1938 to "authorize the abandonment of lines of railroad pursuant to section 1170 of title 11." 45 U.S.C. § 915(a) (Supp. III 1979). Section 1170 of the new Bankruptcy Act provides, in relevant part:

> (a) The court, after notice and a hearing, may authorize the abandonment of a railroad line if such abandonment is—
>
> (1)(A) in the best interest of the estate; or
>
> (B) essential to the formulation of a plan; and
>
> (2) consistent with the public interest.

11 U.S.C. § 1170 (Supp. III 1979).

The phrase "notice and a hearing" is defined in § 102(1) of the new Bankruptcy Act as follows:

> In this title—
>
> (1) "after notice and a hearing", or a similar phrase—

[1]The RLEA also challenges the reorganization court's alleged failure to protect the interests of Rock Island employees in its orders authorizing the sale of Rock Island properties to the St. Louis Southwestern Railway Company ("SSW" sale) and to the Missouri Pacific Railroad Company ("Mo-Pac" sale). For the reasons stated in Part II, *infra*, we dismiss RLEA's appeals from these orders as moot.

> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances . . .

11 U.S.C. § 102(1) (Supp. III 1979).[2]

Thus, to determine whether Judge McGarr provided an adequate evidentiary hearing in authorizing abandonment of the Rock Island, we must consider the particular circumstances of the case, for the issues addressed at the June 2 hearing were anything but new to the reorganization court, which had been totally immersed in the Rock Island's affairs since March 17, 1975. This process of immersion provided indoctrination in a somewhat lengthy history, informed from time to time by hearings leading to: the Commission's finding in September 1979 that the Rock Island was "cashless"; the court's rejection of the Trustee's plan of reorganization in January, 1980; the [4] recommendation of the court's independent consultant and the court's finding that the Rock Island was incapable of reorganization; the I.C.C.'s recommendation that the Trustee be permitted to abandon all lines because "abandonment of the Rock Island and its dissolution as an operating railroad is required by the public convenience and necessity"; and, finally, the court's liquidation order. Additionally, numerous status hearings were regularly held and reports were filed by the Trustee, all of which were a part of the five-year record before Judge McGarr. We believe that, in evaluating this detailed and instructive history of five years' duration, the court, in the exercise of its discretion, did not err in concluding that, under the particular circumstances before it, an additional evidentiary hearing was not required.

[2]Congress has provided the gloss that "after notice and a hearing" as defined in § 102(1) means "after such notice as is appropriate in the particular circumstances (to be prescribed by either the Rules of Bankruptcy Procedure or by the court in individual circumstances that the Rules do not cover . . .)." H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 315 (1977), *reprinted in* [1978] U.S. Code Cong. and Ad. News 5963, 6272.

But, there is another reason for our conclusion. RLEA was seeking an evidentiary hearing to determine essentially whether the Rock Island was reorganizable—a question that had been previously decided in the negative by the reorganization court in its January 25, 1980, liquidation order. In affirming that order, this court determined that the reorganization court had jurisdiction to order the Trustee to prepare a plan of total liquidation and that the court "properly exercised its jurisdiction" in so ordering. Thus, by June 2, 1980, it had already been decided that the Rock Island was unreorganizable and should be liquidated. And the systemwide abandonment ordered on June 2, in effect, fulfilled an important procedural requirement which was based in large measure on substantive decisions that had already been made. But liquidation could not proceed until abandonment was authorized since, without abandonment authority, the Rock Island was not relieved of its common carrier obligations. *See Gibbons v. Chicago, Rock Island & Pacific R. Co.*, Nos. 79-2413, 80-1111, 80-1383 and 80-1538, slip op. at ___ (7th Cir. October, 1981). Under all these circumstances, a further evidentiary hearing would therefore have served no useful purpose.

B. Public Interest

RLEA urges that the reorganization court failed to consider adequately the public interest in authorizing systemwide abandonment. One purpose of a § 77 reorganization court is unquestionably to preserve the debtor "as a living, not a dying, railroad structure." *Van Schaick v. McCarthy*, 116 F.2d 987, 993 (10th Cir. 1941). And, to this end, the reorganization court is required to "balance the conservation of debtors' assets for the benefit of the creditors with the preservation of an ongoing railroad in the public interest" to obtain, if possible, "rehabilitation of the enterprise pursuant to a plan of reorganization." *Matter of Lehigh Valley R. Co.*, 558 F.2d 137, 147 (3rd Cir. 1977). But, in the case before us, [5] the interests of the creditors had been to a sig-

nificant degree subordinated for four and one-half years while the Trustee attempted to develop a workable plan for income-based reorganization of the Rock Island. The plan for a core operation, as finally developed by the Trustee, was found to be infeasible by a court-appointed independent consultant; and, after a hearing at which the creditors and the Federal Railroad Administration (with the apparent acquiescence of the I.C.C.) argued against any core reorganization, the district court ordered total liquidation of the estate.

As a necessary aspect to such a plan, the reorganization court ordered the Trustee to file an application with the I.C.C. to "confirm the abandonment of the Rock Island's total railroad system." As already noted, the I.C.C. advised the court in response to the Trustee's request that "abandonment of the Rock Island is required by the public convenience and necessity," a recommendation endorsed by the United States Department of Transportation at the June 2, 1980, hearing.

Section 1170 of the new Bankruptcy Act, which permits the reorganization court to authorize an abandonment only if such an abandonment is "consistent with the public interest," provides that the trustee must initiate an abandonment application before the I.C.C. 11 U.S.C. § 1170(b) (Supp. III 1979). The Report of the Senate Committee on the Judiciary states the purpose of this provision:

> Subsection (b) permits some participation by the Interstate Commerce Commisssion in the abandonment process. The Commission's role, however, is only advisory. The Commission will represent the public interest, while the trustee and various creditors and equity security holders will represent the interest of those who have invested money in the enterprise. The court will balance the various interests and make an appropriate decision.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 137 (1978). *Accord*, H.R. No. 95-595, 95th Cong. 2d Sess. 423-24 (1978). The statu-

tory scheme thus vests in the I.C.C. the responsibility of representing the public interest, and the district court did not abuse its discretion in approving the I.C.C. recommendation that abandonment was required by the public interest. As we stated in our February 11, 1981, order affirming liquidation of the Rock Island, the reorganization court has been sensitive to the public interest throughout the six-year history of the Rock Island reorganization:

> The RLEA claims that since the creditors have enjoyed the benefits of having a single resolution of all claims, rather than many [6] receiverships, they should bear the burden of serving the public interest by keeping their property invested in rail service. But the history of this case indicates that the reorganization court has duly considered the public interest throughout the reorganization proceedings and has determined that continued operation of the Rock Island no longer serves the public interest considerations required by Section 77.[3]

[3]We held in our February 11, 1981, order that the district court properly exercised its jurisdiction in ordering complete liquidation of the Rock Island. As noted above, the systemwide abandonment order is a critical component of the liquidation plan and flows necessarily from it. As we stated in *Gibbons*:

> [V]iewed as a matter of economics, abandonment represents the final state in the carrier's passage from operation to liquidation. If the financial condition of the railroad becomes so desperate that it is unable to continue operations (and is cashless [to which we now add, and unreorganizable]), the burden may be eased somewhat through the imposition of directed service. Some losses continue, however, at least until the certificate of abandonment issues and the public service obligation terminates. At this critical point, the trustee may begin to liquidate railroad property and realize in an important way the value of the railroad assets. Very significantly, petitioners do not argue here that a condition of cashlessness, no matter how severe or disabling, would in and of itself authorize a railroad to commence the liquidation of its property. It goes without saying that the Rock Island, although cashless and unable to provide service through its own efforts [and unreorganizable] had no authority to proceed to liquidation. That right accrues only upon the termination of the carrier's public service obligation

(Footnote continued on following page.)

RLEA suggests that the district court failed to properly consider the public interest because it did not adequately [7] provide in the abandonment order for measures to assure that Rock Island lines would be sold to provide for continued rail usage instead of being dismantled and sold as scrap. But the reorganization court, in accordance with the recommendation of the I.C.C., directed the Trustee not to scrap or otherwise dispose of some 2,807 miles of track for a period of 180 days following the June 2, 1980, abandonment order. This period was subsequently extended by an additional four months. We do not believe the court abused its discretion in declining to prohibit for a longer period the dismantling of these specified Rock Island properties or in failing to place more track under similar restrictions.[4]

(Footnote continued from preceding page.)

> through the issuance of a certificate of abandonment by the ICC [or, here through the authorization of abandonment by the reorganization court pursuant to § 17(a) of the MRRA].

Gibbons v. Chicago, Rock Island and Pacific R. Co., supra, slip op. at [15-16].

[4]By order 297 entered December 1, 1980, the reorganization court directed:

> 1. That William M. Gibbons, the Trustee herein, be and he is hereby directed, for the period up to and including March 31, 1981 not to scrap, dismantle or otherwise dispose of those rail properties owned by the estate for which he has received expressions of interest, offers to purchase, or is negotiating for sale or lease to parties or entities for continued rail use.
>
> 2. That until the Court's further order, all persons, firms or entities are restrained from physically or otherwise interfering with, or in any manner whatsoever disturbing or affecting the rail properties or rail interest owned by the estate and whose abandonment has been confirmed by this Court's previous orders.

Paragraph 2 of this order has not been altered or amended by the reorganization court, and the trustee informs us that he advised the reorganization court on March 31, 1981, that no dismantling would take place without prior notice to the court. The reorganization court is thus able to continue to consider the public interest in continued rail operations as the liquidation of the Rock Island proceeds.

C. Labor Protection

Appellant argues that the district court, in authorizing systemwide abandonment, failed to provide for payment of labor protection in accordance with § 17(a) of the MRRA, which provides in relevant part:

> In authorizing any abandonment pursuant to this section, the court shall require the carrier to provide a fair arrangement at least as protective of the interests of employees as that required under section 11347 of title 49.

45 U.S.C. § 915(a) (Supp. III 1979).

[8] RLEA argues that since the labor protection obligation set forth in § 17(a) applies to "any abandonment," the district court was required to provide such protection in authorizing systemwide abandonment of the Rock Island. RLEA's position is certainly reflected in the language of the statute. But it is contrary to what seems so clearly to be the intent of Congress in enacting § 17a. Section 17(a) was designed to expedite abandonment procedures for a railroad in reorganization by empowering § 77 courts to approve abandonments, a power that had been previously vested in the I.C.C.[5] However, as stated in the Conference Report accompanying the MRRA, § 17a was *not* intended to work a "change in existing law as it affects employee protection." H.R. Conf. Rep. No. [95-595], 96th Cong., lst Sess. 27 (1979), and the existing law regarding labor protection includes the long established I.C.C. practice of denying labor protection in total abandonments.

Before enactment of § 17(a), approval by the I.C.C. in the form of a certificate authorizing abandonment was required before a

[5]Section 17(a) applies to cases commenced under § 77 prior to enactment of the Bankruptcy Reform Act of 1978; 11 U.S.C. § 1170 (Supp. III 1979) transferred authority to authorize abandonments from the I.C.C. to the reorganization court for reorganizations commenced after enactment of the new Bankruptcy Act.

railroad in reorganization under § 77 could abandon a line of track. 49 U.S.C. § 1a(1) (1976). Each certificate of abandonment was required by § 1a to include "provisions for the protection of the interests of employees at least as beneficial to such interests as provisions established pursuant to section 5(2)(f) of this title and pursuant to section 565 of title 45." 49 U.S.C. § 1a(4) (1976).[4]

[9] This provision was recodified in the revised Interstate Commerce Act of 1978, without substantive change, as 49 U.S.C. § 10903(b)(2) (Supp. III 1979). Section 10903(b)(2) reads [as] follows:

> On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title [formerly § 5(2)(f)] and section 565(b) of title 45.

49 U.S.C. § 10903(b)(2) (Supp. III 1979).

Although both § 1a and § 10903(b)(2) on their face require labor protection to be provided in connection with "each certificate" authorizing abandonment, it had long been the policy of the I.C.C. to deny labor protection in systemwide abandonments. *See, e.g., Bush Terminal R. Co. Entire Line Abandonment*, 342

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[4] The sections cross-referenced in § 1a(4) quantified the protection to be paid to employees displaced as the result of a merger or consolidation of rail carriers, 49 U.S.C. § 5(2)(f) (1976), or as the result of a discontinuance of intercity rail passenger service, 45 U.S.C. § 565 (1976). Those provisions quantified the level of protection by requiring the payment of displacement or dismissal allowances to affected employees equivalent to their wage level prior to the consolidation or discontinuance, adjusted to reflect subsequent wage increases, for a period of six years. *See, e.g., New York Dock Railway v. United States*, 609 F.2d 83 (2d Cir. 1979), *aff'g* 360 I.C.C. 60 (consolidation of two rail carriers); *Oregon Short Line Railroad - Abandonment (Goshen)*, 360 I.C.C. 666 (1980) (partial abandonment).

I.C.C. 34, 51 (1971); *Rutland R. Corp. Abandonment*, 317 I.C.C. 393 (1962), *aff'd sub nom., Brotherhood of Locomotive Engineers v. United States*, 217 F. Supp. 98 (N.D. Ohio 1963). And, when Congress recodified § 1a in § 10903(b)(2) of the revised Act, it approved this policy of the I.C.C., stating that it acted

> without intention to change the policy and practice of the Commision in connection with certificates involving total termination of service by a railroad company.

S. Rep. No. 94-499, 94th Cong. 2d Sess. 218 (1976). We are persuaded that, in the enactment of § 17(a), the applicability of this body of law was similarly preserved. *See* H.R. Conf. Rep. No. 96-583, 96th Cong. 1st Sess. 27 (1979) (quoted *supra*).

The body of law thus preserved by Congress in § 17(a) is described by the I.C.C. in its abandonment report in this case. That report reads in pertinent part as follows:

> Employee Protection. RLEA urges that we recommend employee protection at a level greater than required by New York Dock Ry.—Control—Brooklyn Eastern Dist., 360 I.C.C. 60 (1979). *New York Dock* protection is apparently mandated by section 17(a) of the MRRA. However, under that section the duty to impose employee protection rests squarely with the bankruptcy court. We will make no recommendation, but will point out certain options that the Court has.
>
> [10] The *New York Dock* conditions can be imposed on the Rock Island. However, another viable option is not to impose any form of labor protection. In past instances where entire rail systems have been abandoned and no company would reap the benefits of the abandonment, we have found the imposition of employee protective conditions not to be warranted. *See, Wellsville, Addision & Galeton R. Corp.—Abandonment*, 354 I.C.C. 744, 746 (1978).

In the recent case of *Oregon Short Line Railroad—Abandonment (Goshen)*, 360 I.C.C. 666, 667 (1980), the I.C.C. for the first

time imposed *New York Dock* conditions on a partial abandonment. The Commission expressly recognized the distinction between partial and total abandonments, however, and stated that its decision to impose such labor protective conditions would apply "on all rail abandonment proceedings, except for entire line abandonment." *See also New York Susquehanna & Western Railroad Co.*, 504 F. Supp. 851 (D.N.J. 1980).[7]

In sum, we believe that Congress intended a perpetuation of past practice that labor protection requirements were not applicable to abandonments of whole railroads leaving no rail carrier affiliates still operating. The district court therefore properly declined to provide labor protection in connection with the total abandonment of the Rock Island.

[11] **II.**

By an agreement dated June 21, 1978, the Trustee agreed to sell approximately 1,000 miles of track running from Santa Rosa, New Mexico to St. Louis, Missouri, via Kansas City, Missouri to the Southern Pacific Transportation Company ("SP")[8] for approximately $57 million. The reorganization court authorized

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[7]The policy considerations underlying this distinction were set forth in *Northampton & Bath Railroad Co. Abandonment*, 354 I.C.C. 784, 785-[86] (1980):

> After the entire line of a railroad is abandoned no operating carrier remains to enjoy the benefits of the abandonment or pay the cost of employee protection. The Commission has generally refused to impose employee protective conditions which would in effect, require continued operations for the benefit of employees or further consumption of a failed railroad's properties for payment of employee's benefits after operations cease. The conditions imposed by the review board, those developed in *Oregon Short Line*, are not appropriate for an entire line abandonment where the abandoning railroad has no rail carrier affiliate which continue[s] operations similar to its own.

[8]SP assigned its rights under the agreement to its affiliate, SSW, on November 27, 1978.

the Trustee to seek approval of this sale from the I.C.C. and, after 99 days of hearings in which RLEA participated, the I.C.C. approved the proposed transaction in a decision dated June 6, 1980. On July 31, 1980, the reorganization court, after a hearing, approved entry of the sale.

On March 22, 1980, the Trustee agreed to sell approximately 38 miles of line between Haskell and Hot Springs, Arkansas, to Mo-Pac for approximately $2 million.* On May 8, 1980, the reorganization court preliminarily approved the sale and authorized the Trustee to seek I.C.C. approval. On July 14, 1980, the I.C.C. rendered its decision approving the transaction. The district court approved the sale on July 21, 1980, and denied RLEA's motion for reconsideration on July 31, 1980.

On appeal, RLEA challenges the sufficiency and scope of the labor protection provided in connection with the SSW and Mo-Pac transactions. RLEA did not obtain a stay of the July 21, 1980 and July 31, 1980 orders, however, and its appeals are therefore moot by virtue of Bankruptcy Rule 8-703(a)(6), which describes the effect of an appeal from an unstayed order in reorganization cases:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

[12] In *In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, (Appeal of Montana Dept. of Agriculture, et al.), No. 80-

*The agreement provides in part that:

> MoPac and Rock Island shall each have the right in its sole discretion to terminate this agreement if any court, agency, or any other governmental authority with jurisdiction over this transaction shall order any material changes in this agreement or otherwise impose any material requirements on MoPac or Rock Island as a condition to any necessary approval.

1745 (7th Cir. February 13, 1981), this court applied Rule 8-703(a)(6), holding that the State of Montana's appeal from the Milwaukee reorganization court's approval of the sale of certain abandoned property was moot for failure to obtain a stay. RLEA attempts to distinguish the *Montana* case on the ground that SSW and Mo-Pac, unlike the purchaser in *Montana*, were not "good faith purchasers" within the meaning of Rule 8-703(a)(6) because they were "directly involved in the dispute before the reorganization court." Appellant's reply brief at 22. But there are no allegations of dishonesty, fraud, or unfair dealing in the cases before us, and it appears that SSW and Mo-Pac paid reasonable value for the purchase of the abandoned properties. We cannot accept the argument that Mo-Pac and SSW are not good faith purchasers simply because they were interested parties.

RLEA also argues that, since it was not challenging the *concept* of the Mo-Pac and SSW sales, but rather only the *terms* under which the Trustee agreed to sell to Mo-Pac and SSW and the terms under which Mo-Pac agreed to purchase, it did not stand any reasonable chance of success in obtaining a stay of the reorganization court's orders. Since RLEA did not even attempt to seek a stay, however, this argument is entirely speculative. Moreover, since the provision of labor protection is an aspect of the reorganization court's orders approving the sales, we do not agree that RLEA (which presumably had standing to appeal from these orders) could not reasonably have sought a stay of the orders pending appeal.

RLEA also argues that Rule 8-703(a)(6) does not moot these appeals because the relief it seeks would not "affect" the sales within the meaning of the rule. However, the reorganization court's orders approving the sales defined the labor protection obligations that were to be required in connection with the sale. If this court were to reverse these orders and require that future approval of the sale agreements be conditioned on imposition of the

potentially substantial additional labor protection obligations urged by RLEA, the Trustee might well be required to attempt to unwind these transactions, since they might not be in the best interest of the estate if they were conditioned on substantial additional labor protection obligations. Such an *ex post facto* revision of the economic burdens of the sales (and the corresponding need to unwind the transactions) would frustrate Rule 8-703(a)(6)'s policy of insuring the finality of sales to "good faith holders."

We therefore dismiss RLEA's appeals from the orders approving the sales to Mo-Pac and SSW as moot. With respect to the appeal from the systemwide abandonment order of June 2, 1980, we affirm.